Filed 12/14/09 In re T.B. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re T.B., a Person Coming Under the Juvenile Court Law.	B211440 (Los Angeles County Super. Ct. No. CK35252)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. S.B., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County, Jacqueline Lewis, Juvenile Court Referee. Affirmed.

Michael A. Salazar, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, Kim Nemoy, Senior Deputy County Counsel, for Plaintiff and Respondent.

S.B. (Mother)[1] appeals from the juvenile court's order, following an evidentiary hearing, denying her petition to terminate the legal guardianship previously ordered for her daughter T.B. and to return full custody of T.B. to her. Mother also appeals from the court's denial of her request to continue the hearing on her petition to the date set for adjudication of the supplemental petition filed by the Los Angeles County Department of Children and Family Services (Department) to remove T.B. from the home of her legal guardian, Samuel B., T.B.'s maternal uncle. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

T.B., then only one year old, and her four-year-old brother K.S.[2] were detained in shelter care in September 1998 after the Department filed a petition pursuant to Welfare and Institutions Code section 300, subdivisions (b) and (c),[3] alleging the children were at substantial risk of serious physical harm and emotional damage because of Mother's drug use, the filthy and unsanitary condition of their home and Mother's failure to comply with a voluntary family maintenance services contract with the Department. Several weeks later the juvenile court sustained the petition as amended, directed the children be suitably placed and ordered family reunification services for Mother and the children's father, A.S. Mother's court-ordered services included participation in a drug program with both group and individual counseling.

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[1] In an effort to maintain the privacy of children involved in juvenile cases in the face of the ever-increasing ability of modern technology to breach the confidentiality of juvenile court records, the court now uses a protective nondisclosure policy known as "double suppression." Initials are substituted for both the first and last names of each child who is a party to the action, replacing our traditional practice of including the child's first name and last initial. The double suppression policy also applies to other family members when nondisclosure is necessary to preserve the confidentiality of the party. We refer to S.B. as Mother to limit the use of initials in this opinion.

[2] Mother was only 14 years old when K.S. was born. K.S.'s status is not at issue in this appeal.

[3] Statutory references are to the Welfare and Institutions Code.

The court found Mother in partial compliance with the case plan at the six-month and 12-month review hearings held in June 1999 and October 1999 (§ 300, subds. (e) & (f)). At the 18-month hearing pursuant to section 366.22 in April 2000, K.S. and T.B. were ordered returned to Mother under the supervision of the Department on condition that she comply with the court's orders and, in particular, continue attendance at Alcoholics Anonymous/Narcotics Anonymous meetings.

By December 2000, however, Mother had resumed her drug use and had failed to comply with court orders regarding random drug testing. The Department filed a supplemental petition pursuant to section 387 to remove the children from her home and also filed a section 300 petition on behalf of T.B.'s younger brother, J.B. (born in September 1999), who had not previously been subject to the court's jurisdiction. The court sustained the section 387 petition in February 2001 and, following a contested disposition hearing, set the matter for a permanency planning hearing under section 366.26. In September 2001 K.S. and T.B. were placed in the home of their material uncle (Mother's brother), Samuel B. In November 2001 the court appointed Samuel B. the children's legal guardian. The court terminated its jurisdiction in November 2002 with respect to these two children with "Kin-GAP" (Kinship Guardianship Assistance Payments) in place.

According to the Department's June 2008 interim review report prepared in response to Mother's petition at issue in this appeal, Mother regained custody of J.B. in 2001 and, with the court's permission, she, J.B. and her fourth child, B.L. (born June 2001), moved into Samuel B.'s home. The maternal grandmother also lived in the home. The juvenile court terminated its jurisdiction over J.B. in August 2002.

In April 2008 Mother filed a petition pursuant to section 388 requesting modification of the juvenile court's November 2001 order appointing Samuel B. as T.B.'s legal guardian and granting her full custody of the child. In her petition Mother alleged T.B. was currently in her care and, in fact, Mother had been taking care of all five of her children. (While living with Samuel B., Mother had her fifth child, D.W., born in

May 2005. A sixth child, E.W., was born three months after the filing of the section 388 petition.) Although noting no new circumstances had been asserted in the petition, the court ordered the matter set for a hearing because the best interest of T.B. might be promoted by the requested new orders. On June 9, 2008 the court ordered the Department to respond to Mother's petition.

Mother reported to the Department's social worker who interviewed her that she had moved the children from Samuel B.'s home and filed the section 388 petition because she was concerned about her brother's heavy drinking and legal difficulties. In the Department's response to Mother's petition, filed June 27, 2008, the social worker described Mother's one-bedroom home as small, but fairly clean and suitable for the family. The report stated Mother interacted appropriately with the children and T.B. appeared healthy and was dressed properly. T.B., who seemed to the social worker to be bonded to Mother, said she wanted to remain in Mother's custody with whom she had been living for the past six months. Mother told the social worker she felt capable of caring for T.B. and stated she had maintained sobriety for approximately 10 years. However, Mother was not able to provide the social worker with any documentation of a completed drug program. The Department recommended Samuel B.'s legal guardianship over T.B. be terminated, T.B. remain with Mother, the Department provide six months of family maintenance services and Mother submit to random drug tests.

The court ordered the Department to set up a hair follicle drug test for Mother. Mother initially failed to participate in the testing, which required the court to delay any further hearing on Mother's petition. When finally received in August 2008, the test results were positive for benzoylecgonine (formed in the liver by the metabolism of cocaine) and cocaine. On September 8, 2008 Mother tested positive for cannabinoids (marijuana).

On September 11, 2008 the court received an interim review report (also designated as a response to the section 388 petition) from the Department, which included the positive hair follicle drug test results. Mother denied any recent drug use.

The court ordered T.B. detained in the Department's custody with monitored visitation for Mother and Samuel B. and set a trial date of October 1, 2008 for a contested hearing on Mother's section 388 petition.

On September 16, 2008 the Department filed a section 387 supplemental petition on behalf of T.B., alleging Samuel B.'s history of substance abuse and daily alcohol use created a detrimental home environment and placed the child at risk of physical and emotional harm and damage. In addition, the petition alleged that Samuel B. had failed to provide T.B. with the necessities of life despite receiving monthly government benefits for her care and that his whereabouts were then unknown. Finally, the petition alleged Samuel B. had placed T.B. at risk by leaving her with Mother, who had recently tested positive for cocaine and marijuana and had a history of substance abuse. With the supplemental petition the Department filed a detention report, dated September 15, 2008. After a hearing the following day, T.B. was placed with a maternal aunt. A pretrial conference on the Department's petition was scheduled for October 1, 2008, the date previously set for the contested hearing on Mother's petition.

Mother did not appear at the October 1, 2008 hearing. At the hearing the court granted Mother's counsel's request to set the section 387 petition for trial; a contested hearing on that petition was scheduled for November 12, 2008. Mother's counsel then asked the court to trail the contested hearing on her section 388 petition to the same date "since it's, in essence, the same facts that would be litigated at that time." The court denied this request.

Proceeding to the contested hearing on the section 388 petition, Mother (through counsel) moved into evidence her section 388 petition and the Department's June 27, 2008 response (without objection from the Department). She presented no other written evidence or any testimony in support of her petition. The Department then moved into evidence various other reports it had prepared, including an August 21, 2008 interim review report/further response to section 388 petition, the September 11, 2008 further response, the September 15, 2008 detention report and an October 1, 2008

jurisdiction/disposition report. Counsel for Mother then asked to cross-examine Iris Gonzalez, the social worker who had prepared the initial June 27, 2008 response to Mother's section 388 petition, which had recommended T.B. be released to Mother, as well as the August 21, 2008 and September 11, 2008 reports, which continued to recommend that T.B. remain with Mother.

Gonzalez explained the initial report had been written before any positive drug test results had been received by the Department. The two following reports—prepared after the positive hair follicle test but before the positive marijuana result had been received—continued to recommend T.B.'s release to Mother because the child appeared well cared for and Mother had agreed to cooperate with the Department and attend substance abuse treatment programs. Subsequent to September 11, 2008, however—that is, after the court ordered T.B. could not remain with Mother—Mother's attitude toward, and cooperation with, the Department had changed markedly; she refused to involve herself in services. As a result, according to Gonzalez, the Department now recommended T.B. stay with her maternal aunt but that Mother receive additional services. (Gonzalez had not been the social worker on the case when it was originally before the court. When questioned by the bench officer, who had presided over the proceedings involving Mother and T.B. since 1998, it became apparent Gonzalez was unfamiliar with certain aspects of those earlier matters.)

T.B.'s counsel joined in Mother's request to grant her section 388 petition and return T.B. to Mother's custody. Counsel for the Department argued the petition should be denied and suggested, if the court believed additional services for Mother were warranted, they could be ordered pursuant to section 366.3 when the court considered the Department's section 387 petition to terminate the legal guardianship.[4]

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[4] Section 366.3, subdivision (f), provides that parents whose rights have not been terminated may participate in a guardianship termination hearing and may be considered as custodians for the child if they establish, by a preponderance of the evidence, that reunification is in the child's best interests. If such a finding is made, reunification

The court denied the petition. After reviewing the history of the case—stressing Mother had received 18 months of reunification services in the initial stages of the proceedings and had regained custody of T.B., only to have T.B. re-detained because of Mother's continued drug abuse—and events relating to the pending petition, the court concluded there had been no change in circumstances that would justify modifying the prior orders and returning T.B. to Mother. To the contrary, the court noted it appeared Mother had gone from using marijuana to using both marijuana and cocaine. The court also indicated its dissatisfaction with the Department's investigation of Mother's and T.B.'s current situation, emphasizing it was the court, not the Department, that had demanded additional drug testing.

Mother filed a timely notice of appeal, challenging the court's denial of her petition, as well as its denial of her request to continue the hearing on the petition to the date set for adjudication of the supplemental section 387 petition filed by the Department.

DISCUSSION

1. *The Juvenile Court Did Not Abuse Its Discretion in Denying Mother's Request To Continue the Contested Hearing on Her Petition To Modify Prior Orders*

The juvenile court may continue a dependency hearing only upon a showing of good cause and only if the continuance is not contrary to the interest of the child. (§ 352.) The court's ruling denying a continuance is reviewed for abuse of discretion and will not be overturned unless the decision is arbitrary, capricious or patently absurd, resulting in a manifest miscarriage of justice. (*In re Karla C.* (2003) 113 Cal.App.4th 166, 180; see *In re Gerald J.* (1991) 1 Cal.App.4th 1180, 1187.) Continuances in dependency proceedings are discouraged. (*In re Karla C.*, at p. 179.)

Mother filed her section 388 petition to modify in April 2008; the court promptly set the matter for a hearing and ordered the Department to respond. However, the contested hearing on Mother's petition was not finally scheduled to proceed until

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services may again be provided to the parent for up to six months. (See *In re R.N.* (2009) 178 Cal.App.4th 557, 565 & fn. 6.)

October 1, 2008—nearly six months after the petition was filed—largely because of Mother's delay in complying with the court's order that she undergo drug testing. The only justification proffered for again continuing the hearing was that the evidence to be presented would largely duplicate the evidence necessary to determine the Department's section 387 supplemental petition seeking to terminate Samuel B.'s guardianship of T.B., set for a contested hearing six weeks later. Mother's counsel did not state she was unprepared to proceed on October 1, 2008 and, although Mother was not present at the hearing, did not suggest Mother's testimony was necessary.

Although there may have been some efficiency in hearing and deciding Mother's section 388 petition and the Department's section 387 petition at the same time, the court acted well within its broad discretion in refusing to postpone any further its determination of Mother's petition seeking a return of T.B. to her.[5]

2. *The Juvenile Court Did Not Abuse Its Discretion in Denying Mother's Request To Return T.B. to her Custody*

Section 388 provides for modification of prior juvenile court orders when the moving party presents new evidence or a change of circumstances and demonstrates modification of the previous order is in the child's best interest. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317; *In re Jasmon O.* (1994) 8 Cal.4th 398, 415; see Cal. Rules of

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[5] Mother attempts to bolster her argument the juvenile court abused its discretion in denying *her* request for a continuance by referring to the court's denial of the *Department's* mid-hearing request for a continuance to allow its social worker Iris Gonzalez to familiarize herself with the earlier proceedings involving T.B. That request had been made during Gonzalez's testimony when the court expressed concern about Gonzalez's recommendation that T.B. be returned to Mother in light of Gonzalez's lack of knowledge of the basis for the court's earlier findings that supported removing the child from her home. The Department has not sought review of that denial, and Mother lacks standing to do so. (See *In re D.S.* (2007) 156 Cal.App.4th 671, 674.) In any event, the transcript of the hearing plainly reveals the court, which had presided over the case since its inception and was extremely familiar with Mother's history, was not seeking additional information from Gonzalez but was using rhetorical questions to challenge the soundness of her recommendation. No continuance was warranted.

Court, rule 5.570(e).) We review the juvenile court's decision to grant or deny a section 388 petition for abuse of discretion. (*Stephanie M.*, at p. 317; *In re Mary G.* (2007) 151 Cal.App.4th 184, 205.) We may disturb the juvenile court's exercise of that discretion only in the rare case when the court has made an arbitrary, capricious or "patently absurd" determination. (*Stephanie M.*, at p. 318.) We do not inquire whether substantial evidence would have supported a different order, nor do we reweigh the evidence and substitute our judgment for that of the juvenile court. (*Ibid*.) We ask only whether the juvenile court abused its discretion with respect to the order it actually made. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.)

Mother argues the evidence at the section 388 hearing demonstrated a remarkable change in her parenting skills: In 1998 T.B. and K.S. were living in a filthy and unsanitary home, and Mother was incapable of providing T.B. with regular care. In contrast, in 2008 there were no signs of any neglect and every indication Mother was fully able to provide adequately for T.B. and her other five children. Mother then suggests by focusing on her two positive drug tests, the juvenile court "failed to consider that recovery is a process." To support her argument Mother cites *In re David M.* (2005) 134 Cal.App.4th 822, 830 (*David M.*), a decision from Division Three of the Fourth Appellate District, holding that absent "evidence of a specific, defined risk of harm," juvenile court jurisdiction is not warranted under section 300, subdivision (b), based on a showing a child's mother has a limited substance abuse problem with marijuana and unrelated mental health issues. (See also *Jennifer A. v. Superior Court* (2004) 117 Cal.App.4th 1322, 1346 (*Jennifer A.*) [evidence insufficient to support finding that mother's use of marijuana on one occasion created substantial risk of detriment to the children's physical or emotional well-being when there was no evidence of clinical substance abuse, no testimony from a medical professional, no testimony of a clinical evaluation and no testimony linking marijuana and alcohol use to her parenting skills or judgment].)

The flaw in Mother's challenge to the juvenile court's order is twofold: First, unlike the situation of the parents in *David M., supra*, 134 Cal.App.4th 822 and *Jennifer A., supra*, 117 Cal.App.4th 1322, Mother is not simply a limited or occasional user of marijuana. She has had a significant substance abuse problem spanning a 10-year period and as recently as six weeks before the hearing on her section 388 petition tested positive for cocaine use. Moreover, again unlike the parents in *David M.* and *Jennifer A.*, whose parenting skills and judgment apparently had never been compromised by their use of illegal substances, Mother has a demonstrated history of neglect, short-lived reform and relapse.

Second, the question whether the lack of adequate supervision and care as a result of a parent's drug use poses a sufficient risk to a child's physical health and safety to adjudge a child a dependent of the juvenile court under section 300, subdivision (b)—the issue in both *David M.* and *Jennifer A.* and one as to which the Department has the burden of proof—is far different from the question whether, following termination of family reunification services, a mother has shown both a significant change of circumstances and that it would be in the child's best interest for the court to modify its prior placement order and return a dependent child to her mother's custody. (See *In re Stephanie M., supra*, 7 Cal.4th at p. 317 [burden of showing requested modification should be granted is on the parent]; see also *In re Angel B.* (2002) 97 Cal.App.4th 454, 464 [after termination of reunification services, the focus shifts from a parent's interest in the care, custody and companionship of the child to what is in the best interest of the child].)

In the context of the more than 10-year history of this case, the juvenile court acted well within its discretion in concluding, in light of the two recent, positive drug tests for cocaine and marijuana, that the absence of any evidence of Mother's neglect of T.B. during the period the child had been living with her and apart from the legal guardian did not demonstrate a sufficient change of circumstances to justify granting the petition and returning T.B. to Mother's full custody. (See *In re Casey D.* (1999) 70

Cal.App.4th 38, 49 [showing that circumstances were changing but not yet changed insufficient to warrant granting § 388 petition]; *In re Carl R.* (2005) 128 Cal.App.4th 1051, 1072 [same].)

In addition, the record fully supports the court's implied finding that granting Mother's petition would not be in T.B.'s best interest. (See *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529 ["It is not enough for a parent to show *just* a genuine change of circumstances under the statute. The parent must show that the undoing of the prior order would be in the best interests of the child."].) To be sure, T.B. appeared bonded to Mother and indicated she wished to remain with her. However, Mother's serious drug problem has not abated. Indeed, as the juvenile court noted with some exasperation, if anything, it had worsened with Mother now abusing cocaine as well as marijuana. It might well be, as the Department suggested, that the court would find it appropriate to provide additional reunification services to Mother if it terminated Samuel B.'s legal guardianship at a future hearing. It was not patently absurd for the court to conclude it was not in T.B.'s best interest to be returned immediately to Mother's full custody.

DISPOSITION

The juvenile court's orders are affirmed.

PERLUSS, P. J.

We concur:

ZELON, J.

JACKSON, J.